

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
November 22, 2005 Session

**STATE OF TENNESSEE v. DAVID ALAN GOLD**

**Appeal from the Criminal Court for Davidson County**  
**No. 2004-I-1256     Seth Norman, Judge**

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**No. M2005-00186-CCA-R3-CD - Filed March 28, 2006**

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On November 19, 2004, the Appellant, David Alan Gold, pled guilty in the Davidson County Criminal Court to one count of accessory after the fact, a Class E felony, and was sentenced as provided by the terms of the plea agreement. On December 3, 2004, Gold filed a motion to withdraw his guilty plea upon grounds that his plea was entered under duress and that his plea was not knowing and voluntary. Additionally, Gold filed a motion to arrest judgment upon the ground that the criminal information failed to charge an offense. Following an evidentiary hearing, the trial court denied the motions. Finding no error in the trial court's rulings, the judgment is affirmed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Kimberly S. Hodde, Madison, Tennessee; and Peter J. Strianse, Nashville, Tennessee, for the Appellant, David Alan Gold.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Tom Thurman, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Factual Background**

The Appellant was charged by means of a criminal information with one count of accessory after the fact, which alleged in pertinent part as follows:

that David Alan Gold . . . , with knowledge or reasonable ground to believe that the offender, to wit Jeffrey Hammonds had committed a felony to wit: especially aggravated robbery, and with the intent to hinder the arrest, trial, conviction, or

punishment of the said Jeffrey Hammonds, provided aid to the said Jeffrey Hammonds to help him avoid arrest, trial, conviction or punishment, in violation of Tennessee Code Annotated § 39-11-411 . . .

On November 19, 2004, the Appellant, an attorney,<sup>1</sup> pled guilty, pursuant to a plea agreement, to accessory after the fact to especially aggravated robbery. As provided by the plea agreement, the Appellant received a sentence of two-years split confinement with service of ninety days in confinement followed by supervised probation. On December 3, 2004, the Appellant filed a *pro se* motion to withdraw his guilty plea. *See* Tenn. R. Crim. P. 32(f). In his motion, the Appellant alleged that his guilty plea was entered under duress due to the time constraints placed upon him by the District Attorney General's office. As such, he contends that his guilty plea was involuntary. Moreover, he asserts that when he entered his guilty plea, he "was operating under a mistake of law" regarding the elements of the charged crime, and this resulted in an unknowing and involuntary plea. In addition, the Appellant filed a motion to arrest judgment, Tenn. R. Crim. P. 34, alleging that the criminal information omitted an essential element of the offense and, as such, failed to charge an offense. Following an evidentiary hearing, the trial court denied both motions.

## **Analysis**

### **I. Motion to Withdraw Guilty Plea**

Tennessee Rules of Criminal Procedure 32(f) provides:

A motion to withdraw a plea of guilty may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed; but to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant to withdraw the plea.

Rule 32(f) does not define "manifest injustice;" however, on a case-by-case basis, reviewing courts of this state have recognized conditions that meet this standard. *State v. Crowe*, 168 S.W.3d 731, 742-43 (Tenn. 2005). Our supreme court has summarized several instances of the need to correct manifest injustice:

(1) the plea "was entered through a misunderstanding as to its effect, or through fear and fraud, or where it was not made voluntary"; (2) the prosecution failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S. Ct. 1194 (1963), and this failure to disclose influenced the entry of the plea; (3) the plea was not knowingly, voluntarily, and understandingly entered; and

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<sup>1</sup>The Appellant maintained an office in Davidson County and was engaged in the practice of civil and criminal law. The factual basis for the guilty plea established that the Appellant assisted Hammonds in the fabrication of a false police report in order to help Hammonds avoid detection and arrest. The Appellant's conduct resulting in the criminal charge did not arise from an attorney-client relationship.

(4) the defendant was denied the effective assistance of counsel in connection with the entry of the plea.

*Id.* at 743. A court should not allow the withdrawal of a guilty plea, however, when the claim of manifest injustice “is predicated on “(a) an accused's ‘change of heart,’ (b) the entry of the plea to avoid harsher punishment, or (c) an accused’s dissatisfaction with the harsh punishment imposed by the trial court or a jury.” *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995).

The Appellant’s argument that the trial court erred in denying the motion to withdraw his guilty plea is twofold. First, he contends that he was mistaken as to the law regarding the requisite elements of the offense of accessory after the fact. Second, he contends that his plea was entered under duress.

### **A. Mistake of Law**

The Appellant asserts that, at the time he entered his guilty plea, he was of the belief that following the adoption of our current criminal code in 1989, the common law rule that required conviction of the principal offender before conviction of the accessory was abrogated and was no longer the law in this state. On the date the Appellant pled guilty, the principal’s guilt had not been adjudicated.<sup>2</sup> As such, he contends that it was his understanding that the principal’s non-adjudication of guilt did not preclude his guilty plea as an accessory. The Appellant argues that during the appeal of his case, this “gray area” of law was definitively answered by our supreme court’s decision in *State v. Hawk*, 170 S.W.3d 547, 551 (Tenn. 2005), which held that “the Reform Act has not abrogated the common law rule as to the offense of accessory after the fact.” The Appellant, relying upon the authority of *Hawk* and its cited authority of *State v. Rogers*, argues that “[a]n accessory after the fact cannot be tried until after the trial and conviction of the principal, unless by his consent.” *Hawk*, 170 S.W.3d at 553 (citing *Rogers*, 65 Tenn. 563, 565 (Tenn. 1873)). Accordingly, the Appellant theorizes from the holdings of *Hawk* and *Rogers* that the conviction of the principal prior to the conviction of the accessory is an element of the offense and that conviction of the accessory may not occur otherwise except by “express consent” of the accessory. The Appellant argues that because “he did not expressly or personally consent to the waiver of the common law element,” his guilty plea was misinformed and unknowingly entered.<sup>3</sup> We find this argument misplaced. First, nowhere in the holding of *Hawk* does our supreme court conclude that the

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<sup>2</sup> At oral argument, it was acknowledged that Hammonds, the principal offender, has since been convicted.

<sup>3</sup> Notwithstanding the Appellant’s argument that he did not expressly consent, the record reflects the following colloquy at the Rule 11 guilty plea hearing:

[STATE]: Mr. Gold has also agreed to waive the conviction of Mr. Hammond on especially aggravated robbery as a condition of this plea.

[THE COURT]: Mr. Gold, did you hear the facts stated to me by the District Attorney?

[APPELLANT]: I did.

[THE COURT]: Are they basically true and correct?

[APPELLANT]: Yes, your honor.

conviction of the principal is an element of the offense of accessory after the fact, nor has this ever been the law in this state.

As relevant to the prosecution in this case, the elements of the offense of accessory after the fact, as statutorily defined, are:

(a) A person . . . who after the commission of a felony, with knowledge or reasonable ground to believe that the offender has committed the felony, and with the intent to hinder the arrest, trial, conviction or punishment of the offender;

(2) provides or aides in providing the offender with any means of avoid arrest, trial, conviction or punishment[.]

T.C.A. § 39-11-411(a)(2) (2003).

The decision in *Hawk* and its cited authorities of *Rogers* and *Wilson v. State*, 230 S.W.2d 1014 (Tenn. 1950), upon which the Appellant relies, address the issue of the conviction of the principal prior to a conviction of the accessory within the context of a jury trial. The requirement of the conviction of the principal relates only to a procedural right affecting the time when the accessory after the fact can proceed to trial. The holding in *Hawk* that “[a]n accessory after the fact cannot be tried until after the trial and conviction of the principal, unless by his consent,” 170 S.W.3d at 553 (citing *Rogers*, 65 Tenn. at 565), is simply the recognition and retention of the common law procedural bar which is carried forward in our current criminal code. Here, the proof at the evidentiary hearing established that the Appellant and defense counsel discussed this very issue prior to entry of the plea, and counsel advised the Appellant that a conviction of the principal was not an element of the offense and, thus, would not need to be proven by the State. Because this is a correct statement of the law, the Appellant’s argument of “mistaken” law is misplaced.

Finally, we conclude that the Appellant’s plea of guilty implicitly constituted a waiver of the common law procedural bar. “A plea of guilty, understandably and voluntarily entered on the advice of counsel, constitutes an admission of all facts alleged and waiver of all nonjurisdictional and procedural defects and constitutional infirmities, if any, in any prior stage of the proceeding.” *Shepard v. Henderson*, 449 S.W.2d 726, 729 (Tenn. 1969) (emphasis added).

With regard to whether a defendant, when entering a guilty plea, must be informed of and expressly waive all available defenses, the Supreme Court has held that, “[r]elinquishment derives not from any inquiry into a defendant’s subjective understanding of the range of potential defenses, but from the admissions necessary made upon entry of a voluntary plea of guilty.” *United States v. Broce*, 488 U.S. 563, 574, 109 S. Ct. 757, 764 (1989).<sup>4</sup> Because the procedural bar in this case was

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<sup>4</sup>In *Broce*, the Court found it immaterial that the defendant was unaware that his guilty plea could result in a waiver of a double jeopardy defense, as long as the underlying plea was both counseled and voluntary. Indeed, even if  
(continued...)

nonjurisdictional and the record reflects that the guilty plea was entered voluntarily, the Appellant waived the procedural bar by his plea of guilty. *See infra* for discussion of voluntariness of the guilty plea.

## **B. Duress**

The Appellant contends that he should be permitted to withdraw his guilty plea because he was “operating” under duress at the time his plea was entered. He argues that he “was under tremendous pressure to make a rapid decision about the remainder of his life” because only eleven days had elapsed from the time when he learned that he was the target of a criminal investigation until he entered a guilty plea. He had only two days to contemplate a plea to accessory after the fact, and the State denied his request for an extension of time. Moreover, he submits that these time constraints placed pressure on his career and family life as well as his health. The Appellant makes no argument of misrepresentation or of unfulfilled promises or other impermissible conduct by the State. In sum, the Appellant argues that the deadlines placed upon him by the prosecution impinged upon the voluntariness of his guilty plea. The voluntariness of the plea, however, is not measured by the dictates of time; rather, it is measured by the defendant’s understanding of the nature of the charge against him, an understanding of the plea agreement and its consequences, and the defendant’s willingness to plea guilty.

The record reflects that a Rule 11 colloquy was conducted, that the Appellant freely admitted his guilt to the crime, and that the trial court found the Appellant’s plea was voluntarily entered. The record does not preponderate against the finding of voluntariness. Accordingly, we agree with the trial court that “manifest” injustice has not been shown which would permit withdrawal of the plea.

## **II. Motion for Arrest of Judgment**

In a second and related issue, the Appellant argues that the trial court erred in failing to arrest judgment of his conviction as provided by Rule 34, Tennessee Rules of Criminal Procedure.<sup>5</sup> This argument is premised upon the Appellant’s assertion that our supreme court in *Hawk* concluded that conviction of the principal prior to the conviction of the accessory is an element of the offense of accessory after the fact. As such, the Appellant contends that because this essential element of the

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<sup>4</sup>(...continued)

the Appellant’s material element argument, now asserted on appeal, had in fact been correct, this would not have required withdrawal of the guilty plea. *See Brady v. United States*, 397 U.S. 742, 757, 90 S. Ct. 1463, 1473 (1970). (“The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.”) Otherwise, the finality of a guilty plea would be meaningless.

<sup>5</sup>Rule 34 provides, in pertinent part, “[t]he court on motion of a defendant shall arrest judgment if the indictment, present or information does not charge an offense or if the court was without jurisdiction of the offense charged.”

offense was not included in the criminal information, no offense was charged, and the trial court was without jurisdiction over the offense.

As discussed *supra*, we have concluded that *Hawk* did not hold that a prior conviction of the principal was an element of the offense of accessory after the fact. Because the information provides notice to the Appellant of the elements of the offense of accessory after the fact, the motion for arrest of judgment was properly denied.

### **CONCLUSION**

For the foregoing reasons, the trial court's denial of the Appellant's motions to withdraw his guilty and for arrest of judgment is affirmed.

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DAVID G. HAYES, JUDGE